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TULANE ENVIRONMENTAL LAW CLINIC

December 19, 2013

By Email to: [curry.ron@epa.gov](mailto:curry.ron@epa.gov), and U.S. Post

166-006

✓ Ron Curry  
EPA Regional Administrator, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202

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Re: Request for Objection to Arkansas Department of  
Environmental Quality's Inadequate 2013 Triennial Review

Dear Mr. Curry,

On behalf of the Ouachita Riverkeeper, the Tulane Environmental Law Clinic submits these comments on the Arkansas Department of Environmental Quality's (ADEQ's) 2013 Triennial Review and its failure to provide fishable/swimmable – or indeed any – designated uses for Coffee Creek and Mossy Lake as the Clean Water Act requires.<sup>1</sup> See 33 U.S.C. § 1313(c). EPA must disapprove ADEQ's Triennial review because ADEQ violated 40 C.F.R. § 131.20, which required the agency to consider new information, here a 2007 Use Attainability Analysis, for Coffee Creek and Mossy Lake, and to revise its standards to include attainable uses for those waters. Also, because EPA has determined that the aquatic use designation is attainable for Coffee Creek and Mossy Lake and ADEQ has failed to so designate those waters, EPA must provide revised standards itself under CWA 303(c)(4)(B).

At this time, ADEQ has completed its public commentary period and will submit its revised water quality standards to EPA in the coming months. "EPA is to review" Arkansas's adopted water quality standards, and must disapprove of those standards because of ADEQ's failure to comply with the Clean Water Act and its implementing regulations. See 40 C.F.R. § 131.5. We request a written response to these comments and notification if and when EPA issues a final decision on ADEQ's Triennial Review.

<sup>1</sup> Ouachita Riverkeeper is a non-profit corporation. It is comprised of citizens in Arkansas and Louisiana concerned about the quality and use of the Ouachita River and its watershed. Ouachita Riverkeeper's purpose is to ensure that the people who use the Ouachita River and its watershed enjoy a clean and safe environment and to protect that environment for future generations. Ouachita Riverkeeper has members who live, work, and recreate in and around the Ouachita River, Coffee Creek, and Mossy Lake.

### Legal and Factual Background

#### *Law*

The Triennial Review process is required under the Clean Water Act (CWA) “for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.” 33 U.S.C. § 1313(c)(1). After a state reviews and revises its water quality standards under applicable regulations, it submits its water quality standards to EPA for a second review and determination of whether those standards comply with the CWA. 33 U.S.C. § 1313(c)(3). Under the implementing regulations, “[EPA’s] review includes a determination of: (1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act; ... (4) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and (5) Whether the State submission meets the requirements included in § 131.6 of this part.” 40 C.F.R. § 131.5(a). Section 131.6, requires, among other things, that the state’s water quality standards submission include (a) “[u]se designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act” and (b) “[m]ethods used and analyses conducted to support water quality standards revisions,” among other things. 40 C.F.R. § 131.6. When “State . . . adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (a)(5) of [§ 131.5], then “EPA *must disapprove* the State’s . . . water quality standards and promulgate Federal standards under section 303(c)(4).” 40 C.F.R. § 131.5(b) (emphasis added).

Section 101(a)(2) states a primary goal of the Clean Water Act: that water quality standards “wherever attainable . . . provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water.” 33 U.S.C. § 1251(a)(2). With regard to water bodies not meeting this goal, *e.g.* not designated as fishable/swimmable, EPA regulations implementing this portion of the Clean Water Act contain specific requirements as to what the state must do in its Triennial Review: “Any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) [*i.e.* fishable and recreational uses] of the Act *shall* be re-examined every three years to determine if any new information has become available.” 40 C.F.R. § 131.20(a). Further, “[i]f such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly.” *Id.* At a minimum, states are required to implement water quality standards that protect existing uses for each water body. 40 C.F.R. § 131.12(a)(1).

In addition to disapproving the Triennial Review submission of a state that fails to comply with 40 C.F.R. §§ 131.6 and 131.20(a), EPA must promulgate its own revised or new water quality standards for a state if *A)* the state does not revise its disapproved submission or its revisions under § 303(c)(3) still do not comply with the CWA or *B)* EPA “determines that a revised or new standard is necessary” to meet CWA requirements. 33 U.S.C. § 1313(c)(4)(A) & (B).

*Facts*

ADEQ's 2013 draft Water Quality Standards, *i.e.* its Regulation 2, expressly exclude Coffee Creek and Mossy Lake from aquatic life, primary contact, and domestic water supply uses. Reg. 2, A-47. ("Site Specific Designated Use Variations Supported by Use Attainability Analysis: ...[for] Coffee Creek and Mossy Lake – no fishable/swimmable or domestic water supply uses"). The draft Regulation 2 also expressly exempts Coffee Creek and Mossy Lake from the "Specific Standards" protecting water quality contained in its chapter 5. Reg. 2, A-48 ("Site Specific Standards Variations Supported by Use Attainability Analysis: ... [for] Coffee Creek and Mossy Lake – exempt from Reg. 2.406 and Chapter Five"). The effect of this exemption is to strip any protections that other designated uses, such as the secondary contact use, could provide to these waters.<sup>2</sup> ADEQ's exclusion and exemption of Coffee Creek and Mossy Lake from water quality protections is based on a Use Attainability Analysis from 1984.<sup>3</sup> Notably, several key sections of the 1984 UAA are missing and unavailable to both ADEQ and the public. *See* March 27, 2009, ADEQ email, attached as Exhibit B (describing the 1984 UAA as "incomplete" and explaining that "sections . . . have gone missing"). The key missing sections are II.C. (Analyses Conducted -Biological Factors); III. (Findings); and IV. (Summary and Conclusions).

In 2007, EPA commissioned a Use Attainability Analysis that contradicted the 1984 UAA and showed existing "aquatic life" in Coffee Creek and Mossy Lake. The purpose of the 2007 EPA UAA was to address whether the "no aquatic life use" designation was still appropriate for the two water bodies. *See* EPA 2007 UAA Executive Summary, at ES-1, attached as Exhibit C. Specifically, the EPA UAA concluded "there is a diverse and abundant, though seasonal, aquatic community in the Reference Site stream." Ex. C, at ES-2. EPA's UAA directly addressed ADEQ's use designations for Coffee Creek and Mossy Lake and the attainability of an aquatic life use designation:

The presence of indicator species . . . within the Reference Site, and occasionally within the sites downstream of the outfall, supports an aquatic life use designation for Coffee Creek and Mossy Lake. . . . Please note that our recommendation that Coffee Creek and Mossy Lake support an aquatic life use designation is based upon the physical, chemical, or biological sampling results presented in this report.

Ex. C, at ES-3. EPA's December 2007 Fact Sheet, titled "Use Attainability Analysis and Water Quality Assessment of Coffee Creek, Mossy Lake, and the Ouachita River,"

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<sup>2</sup> EPA acknowledged ADEQ's failure to provide any protection for Coffee Creek and Mossy Lake in 2011: "EPA has previously discussed our concerns with ADEQ regarding the lack of designated uses for Coffee Creek and Mossy Lake." *See* EPA letter dated April 20, 2011, at p. 2, attached as Exhibit A.

<sup>3</sup> In 2010, ADEQ admitted that the 1984 UAA is the only basis for removing protective use designations for Coffee Creek and Mossy Lake. Draft Permit No AR0001210, Fact Sheet at 2 (Feb. 15, 2010) ("A UAA was performed in the 1980's. As a result of this UAA, the fishable/swimmable uses as well as the drinking water use were removed for Coffee Creek and Mossy Lake."). EPA acknowledged ADEQ's reliance on the 1984 UAA in its 2007 UAA.

reached the same conclusions. Exhibit D, at 1-2. As noted above, however, ADEQ's 2013 Triennial Review did not consider or implement the results of EPA's 2007 UAA.

### Legal Analysis and Comments

***1) EPA Must Object to ADEQ's Regulation 2 Because ADEQ Failed to Consider New Information and Revise its Water Quality Standards, in Violation of 40 C.F.R. § 131.20.***

EPA must disapprove ADEQ's Triennial Review and Regulation 2 revisions because the state agency failed to consider and revise its water quality standards to reflect the information in EPA's 2007 UAA and therefore violated 40 C.F.R. §§ 131.20 & 131.5. The Clean Water Act directs EPA "to approve or disapprove State-adopted water quality standards." *See* 40 C.F.R. § 131.5(a); 33 U.S.C. § 1313(c). In making this determination, EPA must consider "[w]hether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;" and "[w]hether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses . . . ." 40 C.F.R. § 131.5(a)(1) & (4). "EPA must disapprove the State's . . . water quality standards and promulgate Federal standards under section 303(c)(4) . . . if State . . . adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (a)(5) of this section." 40 C.F.R. § 131.5(b).

Also, section 131.20 requires states to use the Triennial Review process to consider any new information for waters without fishable/swimmable designated uses and revise their water quality standards to designate any attainable fishable/swimmable uses:

Any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act [*i.e.* "protection and propagation of fish . . . and wildlife . . . and recreation in and on the water"] shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State **shall revise** its standards accordingly. (emphasis added).

40 C.F.R. § 131.20(a). "This provision in effect established a mandatory requirement to "upgrade" water quality standards . . ." 48 FR 514-00-01 (Nov. 8, 1983). Here, the Clean Water Act required ADEQ to consider any new information for Coffee Creek and Mossy Lake because those waters' protections "do not include the uses specified in section 101(a)(2)," (*i.e.* "protection and propagation of fish . . . and wildlife . . . and recreation in an on the water"). *See* 40 C.F.R. § 131.20(a). The new information of EPA's 2007 UAA shows fish living in those waters, including key and indicator species, *i.e.* an existing "fishable" or "aquatic life" use. *See Ex. C*, at ES-3. The 2007 UAA concluded that the presence of indicator species "supports an aquatic life use designation for Coffee Creek and Mossy Lake." *Id.* Nevertheless, ADEQ failed to even consider this new information.

Without considering this new, 2007 information, ADEQ continued to exempt Coffee Creek and Mossy Lake from the uses specified in Clean Water Act § 101(a)(2) based on the incomplete 1984 UAA. A thirty year old “incomplete” study that has “gone missing” cannot provide “appropriate technical and scientific data and analyses” on which to base removal of section 101(a)(2) protections. *See* 40 C.F.R. § 131.5(a)(4); Ex. B. Accordingly, EPA must disapprove of ADEQ’s performance of its 2013 Triennial Review.

Moreover, the existing presence of fish, *i.e.* aquatic life, in Coffee Creek and Mossy Lake compels a revision of applicable water quality standards to “aquatic life” uses. Water quality standards “must take into consideration the ... protection and propagation of fish, shellfish and wildlife . . . .” 40 C.F.R. § 131.10(a). “Where existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained.” *Id.* §§ 131.10(i); 131.12(a)(1) (“Existing instream water uses and the level of water quality necessary to protect the existing uses *shall be maintained and protected.*”) (emphasis added). Accordingly, consideration of the 2007 EPA UAA, *i.e.* the new information, requires ADEQ to remove the exclusions and exemptions from Coffee Creek and Mossy Lake and to adopt the aquatic life designated use for each water body. ADEQ’s 2013 did consider not remove those exclusions and exemptions. Therefore, EPA must disapprove the 2013 Triennial Review and inform ADEQ that the portions pertaining to Coffee Creek and Mossy Lake conflict with the Clean Water Act and its implementing regulations. *See* 33 U.S.C. § 1313(c)(3); 40 C.F.R. §§ 131.5(a).

**2) *Because EPA Has Determined that Aquatic Life is an Existing Use of Coffee Creek and Mossy Lake, it Must Promulgate Water Quality Standards to Protect that Use.***

In addition, because EPA’s 2007 UAA found that Coffee Creek and Mossy Lake have existing aquatic life uses and support an aquatic life use designation, EPA must promulgate its own water quality standards under CWA § 303(c)(4)(B) to protect Coffee Creek and Mossy Lake. The Clean Water Act provides that EPA “shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard . . . in any case where [EPA] determines that a revised or new standard is necessary to meet the requirements of this Act.” 33 U.S.C. § 1313(c)(4)(B). Here, EPA commissioned the 2007 UAA “to determine if the current ‘no aquatic life use designation’ for Coffee Creek and Mossy Lake [was] appropriate.” *See Ex. C*, at ES-1. EPA’s 2007 UAA concluded “that Coffee Creek and Mossy Lake support an aquatic life use designation . . . based upon the physical, chemical, or biological sampling results presented in this [UAA].” *Id.* at ES-3. It explained that “[f]rom the biological data collected it is apparent there is a diverse and abundant, though seasonal, aquatic community in the Reference Site stream.” *Id.* at ES-2. This determination is consistent with the Clean Water Act’s requirements that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1). EPA published this determination on its Web site.<sup>4</sup> EPA’s published Fact Sheet, “Use Attainability

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<sup>4</sup> [http://www.epa.gov/region6/water/ecopro/watershd/monitrng/studies/ouachita/final-report\\_ouachita\\_dec07.pdf](http://www.epa.gov/region6/water/ecopro/watershd/monitrng/studies/ouachita/final-report_ouachita_dec07.pdf).

Analysis and Water Quality Assessment of Coffee Creek, Mossy Lake, and the Ouachita River,” includes the same determination.<sup>5</sup>

Accordingly, because EPA has determined that revised water quality standards are necessary for Coffee Creek and Mossy Lake to protect existing aquatic life uses, *i.e.* to meet the requirements of the Act, “EPA must disapprove the State’s...water quality standards and promulgate Federal standards under [CWA] section 303(c)(4) . . .” 40 C.F.R. § 131.5(b). Here, appropriate revisions merely require deleting the language at Regulation 2, A-47 & A-48 that remove the aquatic life use water quality standards that would otherwise apply to Coffee Creek and Mossy Lake.

### Conclusion

Because ADEQ regulations exempt Coffee Creek and Mossy Lake from the aquatic life designation despite the findings from EPA’s 2007 UAA that both water bodies have existing aquatic life uses, a revision to ADEQ’s water quality standards is necessary. *See* Reg. 2, A-46. Therefore, EPA must either *1)* disapprove ADEQ’s Triennial Review and require the state to make the necessary revisions under CWA § 303(c)(3) or *2)* promulgate its own standards to protect the existing fishable/swimmable aquatic life uses in Coffee Creek and Mossy Lake under CWA § 303(c)(4)(B).

Prepared by:

Respectfully submitted,



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<sup>5</sup> [http://www.epa.gov/region6/water/ecopro/watershd/monitrng/studies/ouachita/fact-sheet\\_ouachita-river.pdf](http://www.epa.gov/region6/water/ecopro/watershd/monitrng/studies/ouachita/fact-sheet_ouachita-river.pdf).

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Date: December 19, 2013

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